

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD M. GILMAN,

Plaintiff,

No. CIV S-04-0035 DFL KJM P

vs.

EDWARD S. ALAMEIDA, et al.,

Defendants.

ORDER

_____/

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On February 9, 2006, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Plaintiff has filed objections to the findings and recommendations.

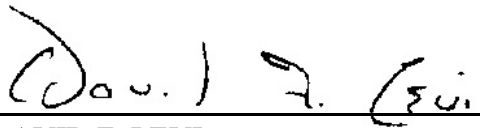
In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis. The court concurs with the magistrate judge that the administrative grievance

1 did not fairly give notice that he was complaining of particular actions by defendant Zhu. In
2 addition, plaintiff failed to seek third level review, thereby failing to exhaust administrative
3 remedies. Even if the grievance had already been rejected as untimely, plaintiff must still attempt
4 to exhaust administrative remedies because the prison may decide to waive untimeliness and
5 address the grievance on its merits. See Ngo v. Woodford, 403 F.3d 620, 629 (9th Cir. 2005).

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. The findings and recommendations filed February 9, 2006, are adopted in full;
- 8 2. Defendant Zhu's August 26, 2005 motion to dismiss is granted;
- 9 3. Plaintiff's Eighth Amendment claim against defendant Zhu is dismissed for
10 failure to exhaust administrative remedies prior to filing suit;
- 11 4. Plaintiff's state law claims are dismissed without prejudice to filing in state
12 court; and
- 13 5. This case is closed.

14 DATED: 3/17/2006

15
16 
17 _____
18 DAVID F. LEVI
19 United States District Judge
20
21
22
23
24
25
26